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EQUITABLE PROTECTION AGAINST WASTE AND TRESPASS.

By WILLIAM Q. DE FUNIAK*

Waste may be described as a permanent injury to real property committed by one having some title less than the whole, in derogation of the rights of those having the remaining interest. There must be privity of estate. If the injury is done by a stranger, one not in privity of estate, then it is a trespass as distinguished from waste.¹ Waste may be further described as permissive or voluntary. Permissive waste is that arising from neglect or omission of care while voluntary waste is that which is active or wilful, as by commission of destructive acts.²

At the early common law there was provision for a writ of waste whereby, in limited situations, recovery of damages could be had for waste. The writ lay only against tenants of estates created by law as distinguished from those which came into being through act of the owner of realty.³ Subsequently, by statute the class liable for waste was enlarged to include tenants for life and tenants for terms of years, and to include estates created by the owner, and by additional statute the punish-

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¹ See MERWIN, *PRINCIPLES OF EQUITY* (1895), p. 428.

"Waste may be defined as injury to the inheritance by one rightfully in possession, but having an estate less than a fee,—as, for example, a tenant for life or years. Waste, because of its nature (injury to the inheritance, permanent damage to the land), necessarily results, if permitted to occur, in irreparable injury." Moreland, *Insolvency as Basis of Equity Jurisdiction* (1933) 22 Ky. L. J. 1.

² MOORE, *CYC. LAW DICT.*, 3d Ed., BISPHAM, *PRINCIPLES OF EQUITY* 680 (10th ed.), TIFFANY, *REAL PROPERTY* secs. 630, 640 (3d ed.).

³ *Camden Trust Co. v. Handle*, 132 N. J. Eq. 97, 26 A. 2d 865, 154 A.L.R. 602 (1942).

ment for waste was fixed at forfeiture of the thing or place wasted and for treble damages.⁴ To the extent that waste is thus recognized at law it is termed legal waste. However, technicalities of the law prevented resort to the action in several instances.⁵

In such instances, where no remedy was available at law, resort began to be had to equity for relief. Thus, we have the situation developed where conduct was not recognized as waste at law or at least was not recognized as giving rise to any cause of action at law but was recognized by equity as a ground for relief, because of the permanent injury threatened. We thus have the development of the so-called equitable waste. In addition, it seems to have become common in England for one creating estates to place in the instrument creating the estate the provision that the estate or interest was to be held without being subject to "impeachment of waste," under which there was no liability at law. Despite this provision, unconscionable acts of destruction might still be grounds for relief, in the eyes of equity, as being equitable waste.⁶

It will be noticed that resort to equity is in any event much more advisable since the prevention of the permanent injury is naturally a more adequate remedy. Although this reason for resorting to equity seems to have developed at a later period, it is now the primary reason for doing so. The result is that the distinctions between legal waste and equitable waste now have very little importance, since the great majority of proceedings

⁴Camden Trust Co. v. Handle, *supra*, n. 3.

Several of our states have statutes providing for treble damages and a few have provisions for double damages. See TIFFANY, REAL PROPERTY sec. 646 (3d ed.), RESTATEMENT, PROPERTY sec. 198, note.

⁵"For purely technical reasons the remainderman or reversioner in fee could not maintain this writ against the tenant in possession if a second life estate intervened, and the second life tenant had no remedy at law in such cases because the action of waste could be brought only by the owner of the immediate estate of inheritance." WALSH, TREATISE ON EQUITY 135 (1930).

"No person shall have an action of waste unless he hath the immediate estate of inheritance." CO. LITT. 53, b.

⁶WALSH, *op. cit. supra* note 5 at 142.

It has not been customary in the United States to include such a provision. For an illustration, however, see Clement v. Wheeler, 25 N.H. 361 (1852).

for relief are in equity.⁷ And equity applies its own standards in determining whether equitable relief is warranted, whether the waste be called legal or equitable. Moreover, it is the consequences, not so much the nature of injury, with which equity is concerned.⁸ From the standpoint of equity, among others, waste may be committed by a tenant for life or for years as against the reversioner or remainderman,⁹ or by one joint tenant or tenant in common against his co-tenant,¹⁰ and generally by one in possession of realty which is security for a right or claim held by another.¹¹

⁷ See *BISPHAM*, *op. cit. supra* note 1 at 679.

"The remedy by a bill in equity is so much more easy, expeditious and complete, that it is almost invariably resorted to. By such a bill not only may future waste be prevented, but, as we have already seen, an account may be decreed and compensation given for past waste." *STORY*, *EQUITY JURISPRUDENCE*, sec. 917, quoted in *Poertner v. Russell*, 33 Wis. 193 (1873). Or, in view of the code merger of law and equity in one court, in most states an injunction plus damages for the waste so far committed may be obtained in the same action.

⁸ "Chancery goes greater lengths than the courts of law in staying waste. It is a wholesome jurisdiction, to be liberally exercised in the prevention of irreparable injury, and depends upon much latitude of discretion in the court." *Kane v. Vandenburg*, 1 Johns. Ch. (N.Y.) 11 (1814).

The solicitude of equity in cases of alleged waste and the reasons therefor are discussed by *LAWRENCE*, *EQUITY JURISPRUDENCE* (1939), sec. 878. See also *Biggs v. Bank of Marshfield*, 90 Ind. App. 467, 169 N.E. 71 (1929).

⁹ "The weight of authority in the United States holds both classes of tenant (liable)." *CHAFEE*, *CASES ON EQUITABLE RELIEF AGAINST TORTS* (1933) 16, note.

¹⁰ Tenant for one year enjoined, see *Poertner v. Russell*, 33 Wis. 193 (1873).

¹¹ Tenant from year to year or tenant for life enjoined by latter, see *Kane v. Vandenburg*, 1 Johns. Ch. (N.Y.) 11 (1814).

¹² While the Statute of Westminster II provided for an action of waste between co-tenants, it did not define waste. Since co-tenants have equal rights in the use and enjoyment of the estate, to warrant equitable relief the conduct of one would have to be malicious or unconscionable enough to constitute waste in the eyes of equity, i.e., constitute equitable waste. See *McCord v. Oakland, etc.*, Min. Co., 64 Cal. 134, 27 P. 863, 49 Am. Rep. 686 (1883) that only equitable waste may be restrained by co-tenant. Although some cases have declared that the co-tenant can restrain legal waste, as in *Williamson v. Jones*, 43 W. Va. 562, 27 S.E. 411, 38 L.R.A. 694, 64 Am. St. Rep. 891 (1897), the test to determine what is legal waste will be found to be exactly that used to determine equitable waste. See *WALSH*, *op. cit. supra* note 5 at 146.

¹³ Thus waste may be enjoinable by a mortgagee against his mortgagor in possession, or for that matter by a mortgagor against the mortgagee in possession, by a contract purchaser against his

While the English statutes were early construed to include permissive as well as voluntary waste, it seems now to be the view in England that equity will not restrain permissive waste necessarily involving mandatory orders to perform positive acts.¹² While the same view has sometimes been taken in the American cases, on the ground that it is too difficult or not practicable for the court to supervise the performance of the positive acts,¹³ the contrary view has frequently been taken,¹⁴ and the modern cases generally can be expected to take the present more liberal view of the ability of equity to supervise performance of positive acts and to grant equitable relief against permissive waste.¹⁵

Originally the typical illustrations of waste were permanent injury to the estate by the cutting of timber or by removing

vendor in possession or by the vendor against the contract purchaser in possession. Cases illustrative of these and other situations, see CHAFEE, CASES ON EQUITABLE RELIEF AGAINST TORTS 29, 30, note (1933). See also GLENN, MORTGAGES sec. 194 et seq. (1943), annotation, Right of mortgagee to maintain suit to stay waste, 48 A.L.R. 1156; annotation, Exploitation of oil or gas resources by mortgagor, or purchaser or lessee subsequently to mortgage, as waste against mortgagee, 95 A.L.R. 957.

¹² Camden Trust Co. v. Handle, *supra* note 3; Kirchwey, *Liability for Waste* (1908) 8 COL. L. REV. 425, 624.

¹³ See Camden Trust Co. v. Handle, *supra* note 3.

In TIFFANY, REAL PROPERTY sec. 642, (3d ed.) it is declared that "it has usually been decided" that courts of equity will not take jurisdiction of a proceeding to restrain permissive waste. It is to be noticed that several of the authorities cited are English and Canadian. American authorities to the contrary are disregarded.

¹⁴ Prevalence of American cases granting equitable relief, see WALSH, *op. cit. supra* note 5 at 140, 141, Kirchwey *Liability for Waste* (1908) 8 COL. L. REV. 624, 634.

"in equity an injunction will be granted to restrain permissive as well as voluntary waste." Poertner v. Russell, *supra* note 7, citing Story

In the case of voluntary waste, courts have not only enjoined further acts of waste, but ordered restoration of what has already been wasted or injured, thus definitely requiring a positive or affirmative act. The classic example of this is Vane v Lord Barnard, 2 Vern. 738, 23 Eng. Rep. 1082 (1716).

¹⁵ But see Camden Trust Co. v. Handle, *supra* note 3.

Failure of a life tenant to pay taxes, with possibility of a resulting tax sale, has been treated as permissive waste. See Thayer v. Shorey, 287 Mass. 76, 191 N.E. 435, 94 A.L.R. 307 (1934), and annotation thereto. The expediency of extending the term waste to such a default is subject to doubt, as remarked by TIFFANY, REAL PROPERTY sec. 630 (3d ed.).

stone, coal or ore, which it will be noted constitute acts of voluntary waste,¹⁶ but waste, from the standpoint of equity, would now extend to any injury which impairs or destroys the substance of the estate so as to cause permanent injury¹⁷

Even acts which increase the value of the estate may technically be waste because they change the character of the estate. This type of waste is called *meliorating waste*. Whether equity should prevent the commission of this type of waste should depend on what is ascertained to have been the intent of the one creating the estates or interests or what was his reasonably presumed intent. Such intent or reasonably presumed intent should control. Despite the fact that the value of the estate may be increased, it may have been the intent that it should be preserved in its original condition.¹⁸ The reasonable wishes of those having the remaining interests should also be given consideration by the equity court.¹⁹ Of course, consideration may be and is frequently given to the nature of the estate and the necessity of adapting it to the uses for which it was created.²⁰

Trespass, as distinguished from waste, is some direct injury to real property committed by a stranger, in other words by one not in any privity of estate or title with the plaintiff.²¹ By

¹⁶ Notice that in the United States, particularly in the earlier days of this country, a different view might be taken from that in England as to a tenant cutting timber. The necessity of clearing the land for purposes of habitation and agriculture might be involved, necessitating cutting at least a reasonable amount of timber. See BISPHAM, *PRINCIPLES OF EQUITY* 680 (10th ed.) Note (1930) 15 CORN. L. Q. 501, 503.

¹⁷ "Waste is an unreasonable or improper use, abuse, mismanagement or omission of duty touching real estate by one rightfully in possession, which results in its substantial injury" *Thayer v Shorey*, *supra* note 15.

¹⁸ See TIFFANY, *op. cit. supra* sec. 630; Note (1930) 15 CORN. L.Q. 501.

¹⁹ See *Brokaw v. Fairchild*, 135 Misc. 70, 237 N.Y.S. 6 (1929), noted (1930), 15 CORN. L.Q. 501 (1930), 43 HARV. L. REV. 506, *aff'd* 237 App. Div. 704, 245 N.Y.S. 420 (1930), 256 N.Y. 670, 177 N.E. 186 (1931), (without opinion) RESTATEMENT, PROPERTY sec. 140.

²⁰ See *J. H. Bellows v. Covell*, 28 Ohio App. 277, 162 N.E. 621 (1927).

²¹ See MERWIN, *PRINCIPLES OF EQUITY* 429, (1895).

At an early date it became established that the English courts of chancery, although enjoining waste, did not enjoin trespass. Eventually, it was recognized that trespass constituting a permanent injury to the freehold, as in the case of waste, was logically grounds for equitable relief, hence the origin of the term "trespass in the nature of waste." As in the case of waste, equitable relief has been

direct injury to real property is usually meant some injury resulting from actual physical or tangible contact or invasion on or below the surface of the property. This physical invasion may be by the defendant in person or by some force projected by him.²² Actual invasion above the surface, even if physically touching some building or other improvement on the property, while sometimes classed as a trespass,²³ is frequently distinguished by courts of equity from a trespass and classified as a nuisance.²⁴ The trespass may be committed under no claim or color of right, in which event it involves no dispute as to title, or it may be committed under some claim or color of right or title which is in conflict with or hostile to the plaintiff's claimed ownership and thus involve an issue of fact at law as to title. In the latter situation a difficulty is presented in non-code states which is discussed subsequently.

Equitable relief, by way of injunction, is warranted where the remedy at law is inadequate. The remedy at law is considered inadequate where the injury being caused or which is extended to any injury from trespass which impairs or destroys the substance of the estate. See *Kellogg v. King*, 114 Cal. 378, 46 Pac. 166, 55 Am. St. Rep. 54 (1896), *McCLINTOCK, HANDBOOK OF EQUITY* 230 (1936) *WALSH, TREATISE ON EQUITY* sec 28 (1930).

²² Where blasting on neighboring property causes rocks or the like to be hurled on plaintiff's land, there is certainly a sufficient physical invasion to constitute trespass. See *East v. Saks*, 214 Ala. 58, 106 So. 185 (1925). Where the injury results from the shock or concussion of the blasting, there would seem to be some conflict of opinion, but it would seem more correct to term the situation a nuisance.

Some disagreement exists as to whether allowing impounded waters to escape or percolate to the plaintiff's property to his injury or discharging water on his property is a nuisance or a trespass. Classified as a nuisance, see *Nelson v. Robinson*, 47 Cal. App. 2d 520, 118 P. 2d 350 (1941) as a trespass, see *Rueckert v. Sicking*, 20 Ohio App. 162, 153 N.E. 129 (1923).

²³ Conflict of opinion as to whether this is an adverse user or a dispossession, with reference to availability of legal action of ejectment, see *WALSH, op. cit. supra* note 21 at sec. 31.

Where airplanes are involved, as in low level flights over property of plaintiff, the act to the extent that it is wrongful is usually termed a trespass and enjoined as such. See *Causby v. United States*, 60 F. Supp. 751 (1945), noted (1945) 58 HARV. L. REV. 1252; *Burnham v. Beverly Airways, Inc.*, 42 N.E. 2d 575 (Mass. 1942), noted (1942) 22 B.U.L. REV. 625 (1943) 28 CORN. L. Q. 200.

²⁴ "The wrong here complained of was an encroachment, not upon plaintiff's land, but upon the space above the land, and therefore was not a trespass, but a nuisance." *Kafka v. Bozio*, 191 Cal. 746, 218 Pac. 753, 29 A.L.R. 833 (1923), citing *WOOD, NUISANCES*, and noted 33 YALE L. J. 557 (1924).

threatened with reasonable probability will be substantial and permanent or, to phrase it otherwise, will be irreparable.²⁵ The situation is one in which no pecuniary recovery, no matter how large, can repair the injury or restore the status quo.

In many jurisdictions, the remedy at law is also inadequate where the trespass is repeated or continuous, involving recourse to multiplicity of actions at law for damages and thus resulting in serious vexation, harrassment or oppression.²⁶ In jurisdictions which specifically require that irreparable injury be alleged and proved as threatened, as prerequisite to equitable relief, it would not appear that mere necessity of recourses to a multiplicity of actions at law for damages would constitute irreparable injury. These latter jurisdictions, however, quite frequently advance the ground that the repeated or continuous acts of trespass might give rise to an easement or adverse right or title in the property which would constitute irreparable injury since it would thereby reduce the substance of the plaintiff's estate.²⁷ And there is also the probability that the cumulative effect of recurring acts of trespass will be permanent or irreparable injury.²⁸ It may also be noticed that repeated or continuous acts of trespass may interfere with the plaintiff's reasonable enjoyment and use of his property and thus in that way reduce or destroy the substance of his estate.²⁹

Another ground for equitable relief advanced in the case of trespass has been that damages are so speculative or con-

²⁵ In California, for example, it is specifically required that irreparable injury be alleged and proved, as prerequisite to equitable relief. See *Mechanics' Foundry v. Ryall*, 75 Cal. 601, 17 Pac. 703 (1888).

²⁶ *Baker v. Howard County Hunt*, 188 Atl. 223 (Md. 1936)

Although the term "multiplicity of actions at law" originally meant causes of action against a plurality of persons, the term now is also applied to a succession of actions between the same parties, in the case of repeated or continuing trespasses. See LAWRENCE, *EQUITY JURISPRUDENCE* sec. 872 (1929).

²⁷ *Union Oil Co. v. Domengeaux*, 30 Cal. A. 2d 266, 86 P. 2d 127 (1939).

²⁸ As where repeated trespasses to cut down timber will result in converting timber land in waste and pasture land. See *Shupley v. Ritter*, 7 Md. 408, 61 Am. Dec. 371 (1855).

²⁹ *Kellogg v. King*, 114 Cal. 378, 46 Pac. 166, 55 Am. St. Rep. 54 (1896), *Baker v. Howard County Hunt*, 188 Atl. 223 (Md. 1936), *Ashinsky v. Levenson*, 256 Pa. 14, 100 Atl. 491, L.R.A. 1917D 994 (1917).

jectural that compensation cannot be adequately measured or determined in an action at law.³⁰ However, this will usually be found to exist in connection with other grounds, such as the probability of permanent or irreparable injury or necessity of a multiplicity of actions at law.³¹ Whether insolvency of the defendant renders the remedy at law inadequate is a matter of dispute. In some jurisdictions, insolvency alone is declared to render the remedy at law inadequate and to warrant equitable relief. In others, it is not in itself enough to render the remedy at law inadequate, although insolvency is recognized as a factor which may be considered with others in determining the matter of inadequacy.³²

In the case of an occasional trespass, temporary in its results, threatening no permanent or irreparable injury or not vexatious or oppressive in nature, the plaintiff is left to his remedy at law. Indeed, resort to calling a policeman may be sufficient in some cases.³³ The equitable maxim may also be kept in mind that "Equity does not stoop to pick up pins."

Where the plaintiff alleges trespass by the defendant and the latter justifies himself under some claim of legal right or title hostile to or in conflict with the plaintiff's legal right or title, the plaintiff's legal right must first be established before it can be determined whether he is entitled to equitable relief. The determination of the legal right is not within the jurisdiction of equity. So, where law and equity are administered in separate courts, the equity court will refuse to assume jurisdiction until the plaintiff's legal right has been determined in his favor in a court of law.³⁴ Even then it must appear, to warrant equity jurisdiction and relief, that the determination in favor of the plaintiff's legal right or title in the court of law has proved inadequate or ineffective to provide the means of

³⁰ *Baker v Howard County Hunt*, *supra* note 29.

³¹ *Baker v Howard County Hunt*, *supra* note 29.

³² See McClintock, *Adequacy of Ineffective Remedy at Law* (1932) 16 MINN. L. REV. 233 (1932) Moreland, *Insolvency of Defendant as Basis of Equity Jurisdiction in Tort Cases* (1933) 22 KY. L. J. 1.

³³ *Randall v Freed*, 154 Cal. 299, 97 Pac. 669 (1908) *Mechanics' Foundry v. Ryall*, 75 Cal. 601, 17 Pac. 703 (1888).

³⁴ See *McRaven v. Culley*, 324 Ill. 451, 155 N.E. 282 (1927).

terminating the defendant's trespass.³⁵ Judgment in the legal action of ejectment may frequently be effective to terminate the wrongful trespass where amounting to dispossession of the plaintiff.

However, gradual modification of the foregoing situation has come about in this country even where law and equity have been administered in separate courts. For example, on occasion equity courts have retained the suit in equity, with the issuance of a temporary injunction, while the matter of the legal title was determined in a court of law.³⁶ Or statutes may authorize the retention of the suit in equity and the sending of the issue at law to the law court for determination and the certification of such determination back to the equity court, which then proceeds from that point, dismissing the suit if the legal title has been determined favorably to the defendant or proceeding to consider the need for equitable relief if the determination has been favorable to the plaintiff.³⁷ Or it may be provided that the equity court itself may determine the question of the legal title, without a jury, upon consent of the parties, or else authorized to impanel a jury for determination of the question.³⁸

The merger of law and equity powers in one court, in one form of civil action, under the codes, has resulted in removing any difficulties by permitting the same court in which the request for equitable relief is filed to determine the matter of the legal title and then proceed from there to the equitable issue.³⁹

In the code states, some question may arise, of course,

³⁵ See *Hirschberg v. Flusser*, 87 N.J. Eq. 588, 101 Atl. 191 (1917), where means of enforcement of judgment in plaintiff's favor in action at law were inadequate to remove encroachment by defendant on plaintiff's land.

³⁶ *Erhardt v. Board*, 113 U.S. 537, 5 S. Ct. 565, 28 L. Ed. 1116 (1885).

³⁷ See *Lake Lenore v. Delaware, L. & W. R. Co.*, 113 N.J. Eq. 533, 168 Atl. 178 (1933).

³⁸ "The Chancellor may himself determine the question, if there be no objection; or he may order the legal title settled by a judgment at law or by a jury upon a feigned issue, at the election of the defendant." *Lake Lenore v. Delaware, L. & W. R. Co.*, *supra* note 37.

Apparently, even without statutory authorization, many cases in the past have held that, if the parties waive the question of a jury, the equity court could settle the disputed question of title. *WALSH, op. cit. supra* note 5 at 165.

³⁹ *Corning v. Troy Iron & Nail Factory*, 40 N.Y. 191 (1869).

as to whether an action of ejectment may not be proper as affording adequate relief, rendering it unnecessary if not actually improper to resort to the equitable powers of the court. This may be especially true where recovery of the possession of realty is the real basis rather than the prevention of continued or repeated trespasses not involving a continued dispossession of the plaintiff.⁴⁰ This may become a matter of prime importance to the defendant who is entitled to a jury trial in the action of ejectment but who will be deprived of a jury trial if the action is phrased as one for equitable relief.⁴¹ However, if trespass is accomplished by an encroachment in the nature of a building or the like, it becomes apparent that equitable relief is much more adequate and effective to bring about its removal.⁴²

⁴⁰ See WALSH, *op cit. supra* note 5 at 165.

⁴¹ In *Campbell v Rustigian*, 60 Cal. A. 2d 500, 140 P. 2d 998 (1943) it was stated that the right to trial by jury must be determined from the pleadings; even though the plaintiff is not in possession, if the pleadings do not raise the issue of the right to possession but merely seek to quiet title to realty, no issue of law is raised which requires a trial by jury and the proceeding is equitable in nature. But compare *Newman v. Duane*, 89 Cal. 597, 27 Pac. 66 (1891) *Syracuse v Hogan*, 234 N.Y. 457, 138 N.E. 406 (1923), to effect that even though equitable relief alone was sought, the recovery of the possession was the main question and thus presented an action of ejectment requiring a jury trial.

⁴² This is illustrated by *Hahl v. Sugo*, 169 N.Y. 109, 62 N.E. 135 (1901).